Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

JOSEPH A. IMPARATO,

Petitioner,

versus

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION, UNITED STATES DEPARTMENT OF ENERGY, HAZEL O'LEARY, SECRETARY OF ENERGY, and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "central figure" theory, imposing personal liability for corporate obligations under the Economic Stabilization Act and the Emergency Petroleum Allocation Act – a theory created by the Temporary Emergency Court of Appeals and the Department of Energy – is inconsistent with all case law existing at the time the Acts were enacted?

2. Whether personal liability for an amount now in excess of $150,000,000 can be imposed on a corporate officer as "restitution" for overcharges made by a corporation in violation of the oil pricing laws, in the absence of any evidence that the officer received any of the money derived by the corporation from the overcharges?

3. In the alternative, whether the Federal Circuit misapplied the remedy of restitution by allowing the government to collect the full amount of corporate overcharges from a corporate officer in the absence of any evidence of the value of the benefit he received, if any?

4. Whether the Federal Circuit erred in holding that the Department of Energy had satisfied its burden of proof when the Department of Energy maintained throughout the underlying administrative proceedings that Petitioner had the burden of proof to show lack of receipt of benefits from the corporate violations?

5. Whether the Federal Circuit erred in applying "federal common law" in this case when one of the questions to be determined was whether personal liability of a corporate officer was to be imposed under applicable state law?

LIST OF PARTIES

The following persons or entities participated in the proceedings in the United States District Court for the Southern District of Texas and in the United States Court of Appeals for the Federal Circuit:

1. Joseph A. Imparato
   Plaintiff in the District Court
   Appellant in the Court of Appeals
   Petitioner in the Supreme Court

2. Houston Oil & Refining, Inc.
   Plaintiff in the District Court
   Appellant in the Court of Appeals

3. United States Federal Energy Regulatory Commission, United States Department of Energy, Hazel O'Leary, Secretary of Energy, and the United States of America
   Defendants in the District Court
   Appellees in the Court of Appeals
   Respondents in the Supreme Court

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PETITION FOR WRIT OF CERTIORARI

Joseph A. Imparato ("Imparato") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this proceeding on September 10, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 95 F.3d 1126 and is reproduced at Appendix A. The order of the United States Court of Appeals for the Federal Circuit denying the petition for rehearing and suggestion for rehearing *in banc* is not reported and is reproduced at Appendix E. The Judgment of the United States District Court for the Southern District of Texas is reproduced at Appendix B. The memorandum opinion of the United States District Court for the Southern District of Texas is not reported and is reproduced at Appendix C. The order issued by the Federal Energy Regulatory Commission ("FERC") is reported at 65 FERC ¶ 61,022 and is reproduced at Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Federal Circuit was entered on September 10, 1996. Imparato's petition for rehearing and suggestion for rehearing *in banc* was denied on November 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 209 of the Economic Stabilization Act ("ESA") provides, in pertinent part:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. . . . In addition to such injunctive relief, the court may also order **restitution** of moneys received in violation of any such order or regulation. (Emphasis added).

STATEMENT OF THE CASE

This is an appeal by Joseph A. Imparato ("Imparato") from a final order issued by the FERC on October 4, 1993, in which the FERC found that Houston Oil & Refining, Inc. ("HO&R") violated the Department of Energy's ("DOE") layering regulation, 10 C.F.R. § 212.186 (1980) (the "Layering Rule"), and imposed joint and several liability on HO&R and Imparato, HO&R's president, for $105,000,000 as restitution. *See Houston Oil and Refining, Inc. and Joseph A. Imparato*, 65 FERC ¶ 61,022 (1993). The basis for liability was, ostensibly, Section 209 of the ESA

as incorporated into the Emergency Petroleum Allocation Act ("EPAA").[1]

Procedural History. Imparato and HO&R filed a Complaint in District Court for review of the October 1993 FERC Order in December 1993. The DOE answered on behalf of all named defendants and joined the United States of America as a party. The District Court ordered that the respective cases be submitted on cross motions for summary judgment and, thereafter, on March 15, 1995, the Court issued its Order and Memorandum Opinion and granted Respondents' Cross-Motion for Summary Judgment. The Federal Circuit affirmed the summary judgment on September 10, 1996[2] and denied Imparato's petition for rehearing and suggestion for rehearing *in banc* on November 18, 1996.

Background Facts. On May 24, 1984, the Economic Regulatory Administration ("ERA") began administrative enforcement proceeding against HO&R by issuing a Proposed Remedial Order ("PRO") which set forth the ERA's proposed findings of fact and conclusions of law. According to the PRO, after an audit of the books and records of HO&R, the ERA determined that HO&R violated DOE regulations. The ERA alleged that HO&R charged prices in excess of its actual purchase prices during the period

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[1] 12 U.S.C. § 1904 note (1976 ed.), incorporated into the EPAA as Section 5(a)(1), 15 U.S.C. § 754 (1976 ed.).

[2] *See Houston Oil & Refining, Inc. v. United States Federal Energy Regulatory Comm'n*, 95 F.3d 1126 (Fed. Cir. 1996); *see* App. A.

June 1979 through August 1980 without performing any service or other function traditionally and historically associated with the resale of crude oil, and, therefore, that HO&R had violated the Layering Rule. The Layering Rule is applicable to a reseller of crude oil. *See* 10 C.F.R. § 212.186 (1980). The ERA requested that the Office of Hearing and Appeals ("OHA") issue a Remedial Order with regard to the layering violations requiring HO&R to refund $105,040,024.76.

Thereafter and prior to the issuance of a Remedial Order, the ERA filed a motion to join Joseph A. Imparato, president of HO&R, as a party to the enforcement proceeding. The ERA sought to join Imparato as a party under the "central figure" theory of liability claiming that Imparato controlled the allegedly illegal activity addressed by the PRO and the OHA granted the ERA's motion over Imparato's opposition.[3] In 1988, the OHA issued the Remedial Order ("RO")[4] finding that HO&R had violated the Layering Rule by charging prices in excess of the acquisition cost of crude oil in resales of 58,180,034.66 barrels of crude oil from June 1979 through August 1980 and held HO&R and Imparato jointly and severally liable to pay the sum of $105,040,204.76.

On March 10, 1989, David I. Harfield, the Administrative Law Judge, affirmed OHA's decision in its

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[3] *See Houston Oil and Refining, Inc.*, 13 DOE ¶ 83,013 (1985).

[4] *See Houston Oil and Refining, Inc. and Joseph A. Imparato*, 17 DOE ¶ 83,011 (1988).

entirety.[5] On October 4, 1993, the FERC issued an Order Adopting Decision and Proposed Order as Modified Affirming Remedial Order ("Final Order").[6] FERC found no reason to modify the proposed order and, with minor exceptions, adopted it as the Final Order. Further facts are found under each argument as applicable.

REASONS FOR GRANTING THE PETITION

This Petition presents an opportunity for this Court to correct the latest in a series of erroneous decisions of the appellate courts charged with implementation of the Economic Stabilization Act and the Emergency Petroleum Allocation Act. The Temporary Emergency Court of Appeals ("TECA") has created a yardstick for the imposition of personal liability upon a corporate officer for corporate debt never before seen in the general jurisprudence of corporate law. The Federal Circuit, as the statutory successor to TECA, has continued this travesty by holding that the mere inference of a benefit sustains the government's admitted burden of proof to impose personal liability on a corporate officer by a preponderance of the evidence. The end result of the Federal Circuit's opinion in this case is a rule of law that now imposes joint and several liability on corporate officers without

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[5] *See Houston Oil and Refining, Inc. and Joseph A. Imparato*, 46 FERC ¶ 63,022 (1992).

[6] *See Houston Oil and Refining, Inc. and Joseph A. Imparato*, 65 FERC ¶ 61,022 (1993) *see also* App. D.

the necessity of proving concepts traditionally required to impose personal liability for corporate debt.

In an effort to ensure that this patently unfair rule of law continues to survive, the Federal Circuit branded it as a "federal common law" so that it cannot be countermanded by appropriate, albeit presumably preempted, state corporate law. The Federal Circuit's opinion in this case is contrary to an opinion of this Court,[7] conflicts with other case law from the Federal Circuit and its predecessor court,[8] and is contrary to the rule and the statute delineating the burden of proof.[9]

By way of introduction, the Federal Circuit erred in imposing personal liability on Imparato because the "central figure" theory of liability has no basis in the law. Even if this Court concludes that the "central figure" theory is valid along with the corresponding test to impose liability, the DOE failed to present any evidence that Imparato ever received any of the moneys constituting the overcharges. Further, as a procedural matter, the DOE argued (and the FERC agreed) that Imparato had the burden to prove a lack of receipt of benefits from the overcharges, thus shifting the burden of proof to the opponent of an administrative order. If this Court finds that the "central figure" theory is valid and that the DOE

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[7] *See Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994).

[8] *See Hoover Group, Inc. v. Custom Metalcraft, Inc.*, 84 F.3d 1408 (Fed. Cir. 1996); *and Pratt v. Watkins*, 946 F.2d 907 (Temp. Emer. Ct. App. 1991).

[9] *See* 5 U.S.C. § 556(b) (1976) *and* 18 C.F.R. § 385.911 (1990).

presented some evidence of benefit received by Imparato, the remedy of restitution was incorrectly applied in this case by the Federal Circuit because the case law on which that court relied to find that Imparato was liable to repay more than he received does not stand for that proposition. Finally, the Federal Circuit erred in upholding a remedy based on "federal common law" – matters relating to the sanctity of the corporate form are inextricably linked to the law of the state of incorporation. For these reasons, this Court should grant this petition for writ of certiorari.

I. THE FEDERAL CIRCUIT ERRED IN HOLDING IMPARATO PERSONALLY LIABLE FOR THE CORPORATE OVERCHARGES

The DOE imposed massive personal liability on Imparato without any evidence that Imparato ever received even one dollar of the alleged overcharges. Imparato's personal liability was predicated solely on HO&R's corporate liability for the overcharges and the DOE presented no evidence whatsoever that Imparato received any of the proceeds from the alleged overcharges. Instead, the DOE, the FERC, and, finally, the Federal Circuit relied on bogus precedent consisting of TECA opinions[10] that have no foundation in any common

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[10] *See Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.3d 16 (Temp. Emer. Ct. App.), *cert. denied sub nom., Chamberlain v. United States*, 484 U.S. 943, 108 S. Ct. 327 (1987); *United States v. Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), *cert. denied*, 479 U.S. 1030, 107 S. Ct. 873 (1987); *Sauder v. Dep't of Energy*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981).

or statutory law. Indeed, these opinions were based upon a rule of law that was created by TECA in order to force a result not obtainable by the application of any previously recognized corporate law dealing with the imposition of personal liability for corporate obligations upon corporate officers, directors, or shareholders.

The **only** evidence in the record used to find Imparato liable for damages that now exceed $150,000,000, was that Imparato was the president and sole shareholder of HO&R during the audit period. Imparato's statement in his affidavit that he was "familiar with" the crude oil transactions identified in the PRO was utilized to attribute fault on a personal basis to Imparato for all transactions conducted by HO&R. Imparato signed HO&R's monthly Crude Oil Reseller Self-Reporting Forms (Forms ERA-69) filed with the DOE and was listed as the person responsible for preparing and filing the Forms on behalf of HO&R and he was the only person at HO&R involved in setting crude oil selling prices. On the basis of these facts, the DOE determined that Imparato was a "central figure" for purposes of imposing personal liability. This evidence is insufficient as a matter of law to impose such damages on Imparato under the applicable test for personal liability.

The FERC erroneously inferred from Imparato's ownership of HO&R that he benefitted from the regulatory violations and improperly placed the burden on Imparato to establish the negative – that he did *not* benefit from the corporate transactions in question. The Federal Circuit then sanctioned this inference and the unauthorized transposition of the burden of proof. This shift of the

burden of proof to Imparato violated the applicable statutory requirements fixing the DOE's burden in agency proceedings and is contrary to well-established Supreme Court authority.

To impose personal liability under the ESA, according to the DOE, proof is required of (1) participation in the regulated activity, **and** (2) receipt of benefit. *See* App. 21. The Federal Circuit held that proof of the first element necessarily encompassed proof of the second by virtue of Imparato's status as a corporate officer. *See* App. 24-26. The Federal Circuit's reasoning fails for at least five reasons.

First, the judicially-created "central figure" theory of liability is unsupported in the case law cited by its creator, TECA. No cases which TECA claims stand for the proposition that a corporate officer can be personally liable for corporate torts support the result-oriented rule of law ultimately promulgated by TECA and extended by the Federal Circuit. This Court can correct this inherently unfair rule used to circumvent the law relating to personal liability for corporate debt that has been accepted in this country since the advent of the corporation as a legally-recognized business entity.

Second, every single case cited by the DOE for the proposition that it only needed to show the first prong – "central figure" or "animating force" status – contained actual evidence of the amount of money received by the individuals ultimately held liable. This significant piece of missing evidence is the one key fact which distinguishes this case from every other case cited by the DOE.

Despite conducting, in the words of the DOE, "an exhaustive audit," the DOE failed to present any evidence showing that Imparato received any money associated with any of the alleged overcharges. This was admitted by the DOE in oral argument before the Federal Circuit when DOE's counsel stated that the DOE did not have the resources to conduct a full audit. This, in and of itself, should have been sufficient for the Federal Circuit to vacate the Final Order as to Imparato.

Third, in accepting the DOE's abbreviated definition of personal liability, the Federal Circuit ignored the basic definition of restitution which requires receipt of some type of benefit. *See* Restatement of Restitution § 1 (1937). In this case, the benefit would be the money constituting the overcharges. *See id.* at § 150. Receipt of a benefit is the second prong of the two-part test described above and was supposedly applied in this case. *See* App. 21.

Fourth, the Federal Circuit's conclusion ignored the applicable law and rules concerning the burden of proof which require the DOE to prove Imparato's receipt of benefit by a preponderance of the evidence.

Fifth, the Federal Circuit improperly invoked the concept of "federal common law."

A. The "Central Figure" Theory Used To Impose Personal Liability Is A Judicially-Created Rule Unsupported By The Case Law.

TECA and its successor in this field, the Federal Circuit, have created, without precedent, a rule of law unique to the enforcement of the ESA and the EPAA: that

an individual corporate officer or shareholder is personally liable for restitution of moneys received by his corporation without any showing by the government of traditional concepts utilized to impose personal liability on corporate representatives[11] and without showing the receipt by the individual of any of the moneys improperly charged and collected by the corporation. This rule of law has no foundation in American jurisprudence, in the provisions of the applicable statutes being enforced, or in the congressional history of those statutes. It is strictly the product of a result-oriented bureaucracy

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[11] This Court and all of the other Circuits have recognized these traditional concepts; participation in fraud, failure to maintain proper corporate records, under-capitalization of the corporation, use of the corporation as a sham or improper conduit, alter ego and overriding public policy. *See First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 103 S. Ct. 2591 (1983); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03, 80 S. Ct. 441, 443 (1960) ("The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception); *Int'l Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc.*, 856 F.2d 1546 (D.C. Cir. 1988); *Union Mutual Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1 (1st Cir. 1986); *Puma Indus. Consulting Co. v. Daal Associates, Inc.*, 808 F.2d 982 (2nd Cir. 1987); *Kaplan v. First Options of Chicago*, 19 F.3d 1503 (3rd Cir. 1994); *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921 (4th Cir. 1984); *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214 (5th Cir. 1986); *Seale v. Citizens Sav. and Loan Ass'n*, 806 F.2d 99 (6th Cir. 1986); *Plumbers' Pension Fund, Local 130 U.A. v. Niedrich*, 891 F.2d 1297 (7th Cir. 1989); *Barker v. Sac Osage Electric Coop., Inc.*, 857 F.2d 486 (8th Cir. 1988); *L.B. Indus. v. Smith*, 817 F.2d 69 (9th Cir. 1987); *United States v. Van Diviner*, 822 F.2d 960 (10th Cir. 1987); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988).

The DOE offered no evidence on any element of any of these traditional concepts.

cloaked with the mantle of a court. While this illusory rule of law was first conceived and given life by TECA, it has now been adopted, nourished and maintained by the Court of Appeals for the Federal Circuit after it acquired TECA's jurisdiction.

This legal figment of TECA's imagination was born in 1981 in *Sauder v. Dep't of Energy*. *See* 648 F.2d 1341. There, TECA coined the amorphous term "central figure" as the cornerstone for its holding that a defendant can be required to pay restitution of money in excess of what he received and now the Federal Circuit utilizes a "central figure" finding to continue to require restitution of funds not received by the individual corporate officer. Furthermore, as its basis, again without precedent, the Federal Circuit has now redefined this rule of law so that individual corporate officers can be held accountable for corporate statutory violations without requiring a shred of evidence supporting any of the traditional methods for the imposition of personal liability on corporate officers, and without showing any culpable or wrongful conduct on the part of those individuals.

Sauder, the genesis of this "boot strap" precedent, incorrectly cited the case of *Tenneco Oil Co. v. Federal Power Comm'n*, 442 F.2d 489 (5th Cir. 1971) as precedent for the "central figure" concept. *Tenneco* was in no way "analogous" to *Sauder* and did not deal with the "central figure" concept as enunciated by TECA in *Sauder* and its progeny. *Tenneco* was an action involving the enforcement of the Natural Gas Act in connection with the recovery of charges received by a producer for natural gas in excess of that allowed by the Federal Power Commission in the issuance of a permanent certificate. Tenneco was not, as

implied by the court in *Sauder*, a "central figure" in the scenario giving rise to the litigation. On the contrary, the liability was imposed on Tenneco for overcharges that were received by its predecessor in interest as well as its co-owners in the gas producing property. The rationale for that liability as expressed by the Fifth Circuit was that in acquiring the permanent certificate for the production and sale of the gas in its name, Tenneco "assumed" the liability of its predecessors operating under the temporary certificate as well as that of its co-owners in the field. 442 F.2d at 497.

The fact that the Federal Circuit's treatment of ESA and EPAA cases with respect to the imposition of personal liability is unique to those cases has been graphically illustrated by an opinion of that court issued only four months prior to the opinion (but after the oral argument) in the instant case. *Hoover Group, Inc. v. Custom Metalcraft, Inc.* was a patent infringement case. *See* 84 F.3d at 1410. In an opinion authored by Judge Newman (Presiding Judge of the Federal Circuit panel in the case at bar), the Federal Circuit reversed the imposition of personal liability upon a corporate officer for a corporate liability. In *Hoover*, the court emphasized the necessity of evidence of traditional methods of imposing personal liability on corporate officers, stating:

> Thus when a person in a control position causes the corporation to commit a civil wrong, imposition of personal liability requires consideration of the nature of the wrong, the culpability of the act, and whether the person acted in his/her personal interest or that of the corporation. . . . The decisions have not always distinguished among the various legal premises, *i.e.*

> (1) justification for piercing the corporate veil based on such criteria as absence of corporate assets or use of the corporate form for illegal purposes; (2) corporate commitment of a commercial tort (such as interference with contract or business advantage, or patent infringement) caused by the officer acting as agent of the corporation; (3) actions similar to (2) but exacerbated by culpable intent or bad faith on the part of the officer; or (4) personal commitment of a fraudulent or grossly negligent act. . . . In *Manville Sales* the court stated that *"to be personally liable for Paramount's infringement under section 271(a), there must be evidence to justify piercing the corporate veil."*

84 F.3d at 1411-12 (quoting *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990) (emphasis added)). Judge Newman concluded that opinion with the following concise statement which, if applied to the case at bar, would have avoided the necessity of this Petition:

> In sum, unless the corporate structure is a sham, as is not here asserted, personal liability for inducement to infringe is not automatic, but must be supported by personal culpability. The district court did not find bad faith or fraud or culpable intent on the part of Mr. Holden. The court erred in imposing liability although the corporate veil was not pierced.

84 F.3d at 1412.

It is inexplicable that the Federal Circuit Court could, within a period of less than five months, demand the existence of evidence to support personal liability of a corporate officer in one case and uphold such liability in

another in the admitted absence of any such evidence. This case is in fatal conflict with *Hoover*.

"Limited liability is a hallmark of corporate law." *Kracher*, 856 F.2d at 1550. If Congress intended "to alter such a universal and time-honored concept" like personal liability for corporate officers, Congress should signal that resolve in a statute's legislative history. *Id.*; *see also Connors v. P & M Coal Co.*, 801 F.2d 1373, 1376 (D.C. Cir. 1986) (finding nothing in the language or purpose of the Multi-employer Pension Plan Amendments Act of 1980 "to justify so significant a compromise of the corporate principle of limited liability . . . to suggest that Congress intended to subject owner-operators of a closely held corporation to personal liability merely because they actively participated in running the business.").

The Legislative history for the EPAA provides:

> [N]othing in the section is intended to change ***existing case law*** relating to the individual responsibility of corporate directors, officers or agents for violations of these corporations.

S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 200, reprinted in 1975 U.S. Code Cong. & Ad. News 1762, 1956, 2042 (emphasis added). TECA's creation of the "central figure" theory of liability now permits automatic personal liability for corporate officers whose corporations violate federal statutes. This is judicial legislation, not judicial interpretation.

B. The DOE Failed To Present Any Evidence Of Benefits Received By Imparato.

The DOE presented absolutely no evidence of the amount of the corporate overcharges received by Imparato, if any, thus failing to meet its burden of proof by a preponderance of the evidence at the FERC. Despite the fact that there is not one iota of evidence in the record that Imparato ever received **any** of the corporate overcharges, the Federal Circuit found that the FERC's Final Order was supported by "substantial evidence." App. 26. The Federal Circuit identified no evidence showing Imparato's receipt of any money and, indeed, could not have for the simple reason that there is none in this record. Because the DOE completely failed to present any evidence that Imparato received any benefits, this Court should grant Imparato's petition for writ of certiorari and vacate the Final Order as to Imparato.

As noted *supra*, the "central figure" theory of liability has no basis in the law and should be abrogated. Even if this Court disagrees with this contention, reversal is mandated nonetheless because the DOE failed to prove liability as a matter of law under the test that it created. The DOE supposedly utilizes a two-part test to determine whether a corporate officer can be held personally liable for a corporation's violation of DOE regulations. Under that test, an individual can be found liable if the DOE can show that: (1) the individual exercised personal control of the firm's regulated operations or participated in the transactions in which the overcharges occurred; and (2) the individual personally benefitted from the overcharges. *See Citronelle v. Herrington*, 826 F.3d at 24.

Therefore, pursuant to its own test, the DOE was obligated to prove by a preponderance of the evidence that Imparato both exercised personal control over HO&R's operations or participated in HO&R's allegedly illegal transactions **and** that Imparato "personally benefited" from receipt of the overcharges. The DOE presented no evidence to satisfy the second prong of the test. Instead, the DOE and the Federal Circuit "inferred" that Imparato personally benefitted from HO&R's alleged regulatory violations. *See* App. 24-25. Essentially, the Federal Circuit held that evidence of the first prong satisfied the second prong. This is contrary to all authority imposing personal liability on corporate officers.

The Federal Circuit listed a number of "benefits" that possibly could have accrued to Imparato and concluded that the "inescapable inference is that Imparato personally benefitted from the overcharges." App. 24. In the face of an empty record on this point, the Federal Circuit postulated that the overcharges could have remained in the corporation, been distributed as salary or dividends to Imparato, been paid to HO&R's employees, or used for charitable contributions. *See* App. 24-25. The only accurate statement by the Federal Circuit relating to this point on appeal was: "[T]here is no evidence as to where those funds went." App. 24. It is possible that if the funds remained in the corporation, some benefit may have been realized by Imparato. It is also possible that Imparato could have directly benefitted if the funds had been distributed as salary or dividends or indirectly benefitted if the funds were paid to corporate employees or used for charitable contributions. It is equally possible that the corporation lost money reselling the oil thereby receiving

no profit whatsoever, which could not possibly have resulted in a benefit to Imparato.

In short, the Federal Circuit engaged in rank speculation in reaching the "inescapable inference" that Imparato personally benefitted and its discussion of "ultimate personal benefit" was meaningless. *See* App. 25. The Federal Circuit completely ignored the fact that the DOE conducted an exhaustive audit of HO&R and had every opportunity to show HO&R's corporate assets, salaries paid, dividends paid, or charitable contributions made, but failed to do so. *See* App. 2. The burden of obtaining this evidence was not a difficult one. It was one the DOE simply chose not to satisfy. The conclusion that the DOE proved benefit by a preponderance of the evidence in this case is simply wrong.

In an oil reseller case, a mere inference of benefit is insufficient. *See Pratt v. Watkins*, 946 F.2d at 912. In *Pratt*, the District Court found that the DOE, not Pratt, had the burden of proof and that the DOE presented no evidence at all that Pratt received the overcharges. *Id.* at 909. TECA affirmed, noting: "To allow the DOE to meet its burden merely by proving that Pratt was **entitled** to a benefit would be to eviscerate the doctrine of restitution." *Id.* (emphasis in original) (citing Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1282-83 (1989) ("restitution must be distinguished from compensation, either by its focus on restoration of the loss in kind or by its focus on defendant's gain as the measure of recovery.")).

The Federal Circuit attempted to distinguish *Pratt* by noting that it involved a passive working interest owner

who had no role in the overcharges. *See* App. 25 n.6. Therefore, before the DOE could recover restitution from Pratt, the DOE was required to show he received a share of the overcharges. *Id.* Here, the Federal Circuit held that *Pratt* is inapplicable because this case involves a "central figure." *Pratt* does not make that distinction – TECA did not distinguish between central figures and passive owners with respect to evidence of receipt of overcharges. *Pratt* is very clear: a mere inference of benefit is insufficient to impose personal liability.

Even a cursory review of the cases relied on by the DOE shows that there was probative evidence of the amount of money received by the individuals from whom "restitution" was sought.[12] Here the Federal Circuit erred in concluding that the DOE established that Imparato personally benefitted from the corporate overcharges by a preponderance of the evidence.

C. The Law Of Restitution Does Not Mandate The Recovery Of Money Never Received.

The Federal Circuit affirmed the DOE RO, holding Imparato liable for the full amount of all overcharges, ostensibly on principles of restitution. The Federal Circuit's misapplication of the remedy of restitution finds no support in the law and is based on TECA precedent that

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[12] *See Citronelle v. Herrington*, 826 F.2d at 26 (parties stipulated to amount of money received by individual); *Sauder*, 648 F.2d at 1347-48 (DOE supplied proof of the actual receipt of money by Sauder); *United States v. Sutton*, 795 F.2d at 1060 (DOE offered evidence of Sutton's net worth before and after "miscertification scheme").

incorrectly cited a treatise that supposedly stands for the proposition that an individual can be forced to disgorge more than he received in an equitable action for restitution.

The Federal Circuit quoted the following language for the proposition that Imparato was liable in "restitution" for the full amount of the alleged overcharges:

> [R]estitution is usually thought of as a remedy by which [a] defendant is made to disgorge ill-gotten gains or to restore the status quo, or both.

App. 13 (quoting 5 Moore's Federal Practice ¶ 38.24[2]). None of the cases[13] cited by Professor Moore in his treatise required a defendant to disgorge more than received and none of the cases required a corporate officer to return all monies received by a corporation – particularly with no evidence that the officer received any of the "ill-

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[13] *See Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S. Ct. 1086, 1091 (1946) (discussing equity powers of court and refund of rent overcharges under Emergency Price Control Act ("EPCA")); *Rogers v. Loether*, 467 F.2d 1110, 1121 (7th Cir. 1972), *aff'd*, 415 U.S. 189, 94 S. Ct. 1005 (1974) (Seventh Amendment case); *McComb v. Scerbo & Sons*, 177 F.2d 137, 137-38 (2nd Cir. 1949) (corporation ordered to pay back wages under Fair Labor Standards Act of 1938); *Creedon v. Randolph*, 165 F.2d 918, 919-20 (5th Cir. 1948) (restitution of rent in excess of maximum established by EPCA); *Bowles v. Skaggs*, 151 F.2d 817, 820 (6th Cir. 1945) (action to order refund of difference between sale price and ceiling price of refrigerator under EPCA); *Chapman v. United States*, 139 F.2d 327, 329 (8th Cir. 1943) (company ordered to pay judgment of sums due to a fund to maintain uniform prices to milk producers under Agricultural Marketing Agreement Act of 1937); *Dunlop v. Darboian Enter., Inc.*, 410 F. Supp. 479, 481 (E.D. Mich. 1975) (right to jury trial under Fair Labor Standards Act).

gotten" money. *See id.* Therefore, the foundation on which TECA based this remedy in *Sauder*, *Sutton*, and *Herrington* is incorrect and has resulted in the propagation of an erroneous rule of law in the field of personal liability of corporate officers. The Federal Circuit has now ensured that this anomaly will survive unless this Court corrects this error.

Restitution is a remedy which is awarded based upon a finding of unjust enrichment. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937). A person is enriched only "if he has **received** a benefit" and is unjustly enriched only if retention of that benefit would be unjust. *Id.* comment a (emphasis added). Except as to fiduciaries, "[r]estitution is generally awarded only in order to deprive the defendant of an enrichment obtained at the plaintiff's expense." 1 G. Palmer, *Law of Restitution*, § 2.10 (1978).

The FERC charged Imparato with responsibility to repay the full amount of overcharges for which HO&R was found to be liable. It is totally illogical and a violation of the principles of the law of restitution to find Imparato liable for the full amount of HO&R's overcharges with no proof that Imparato, the "defendant" in the administrative proceedings, received any of the overcharges. *See* Restatement of Restitution § 1 comment a (1937). The Restatement provides: "In an action of restitution in which the benefit received was money, the measure of recovery for this benefit is the amount of money **received**." Restatement of Restitution § 150 (1937) (emphasis added); *see also Kemp v. Cost Control Marketing & Sales Mgt. of Virginia, Inc.*, 790 F. Supp. 1275, 1279 (W.D.

Va. 1992) (court could only order restitution from corporate officers "in an amount that can be shown to be equal to the benefit they received from [the corporate defendant] as a result of the violations of the [Interstate Land Sales Full Disclosure] Act.").

Restitution is limited to "restoring the status quo [of the defendant] and ordering the return of that which rightfully belongs to the [aggrieved party]." *Tull v. United States*, 481 U.S. 412, 424, 107 S. Ct. 1831, 1839 (1987). Here, the government ordered Imparato to return money that it never proved he received. More importantly, the Federal Circuit held that restitution is based on restoring the status quo of the plaintiff, or the DOE, as opposed to the defendant, Imparato. This is a clear misapplication of the doctrine of restitution and is, rather, imposition of damages.

D. The Federal Circuit Sanctioned An Unlawful Shift Of The Burden Of Proof To Imparato.

Notwithstanding a statement by the Federal Circuit to the contrary, the DOE attempted to force Imparato to prove he did not receive the overcharges, thus forcing him to refute an element of the DOE's case before the FERC. The DOE imposed liability solely because Imparato made "no showing to the contrary. . . . " App. 14. In support of this proposition at the administrative level, the DOE cited to other administrative rulings where it also shifted the burden of proof to the individual charged.[14]

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[14] *See T&M Petroleum Corp.*, 15 DOE ¶ 83,021, 86,255 (1987) (inferring personal benefit to owner because "T&M has made no

That the DOE improperly shifted the burden of proof in prior cases does not remove the taint from or justify the DOE's improper actions in this case. Shifting the burden to Imparato to disprove an element of the DOE's case before the FERC violated the applicable rules which impose this burden on the DOE and is contrary to recent Supreme Court authority.

The Administrative Procedure Act ("APA") provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(b) (1976). This Court recently clarified the meaning of the term "burden of proof" as used in the APA. *See Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994). Because the term was not defined in the APA, this Court construed it in accordance with its ordinary or natural meaning. *Id.* at 2255 (citing *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050, 2055 (1993)).

In *Greenwich Collieries*, the Department of Labor violated the APA in applying what it called the "true doubt" rule in adjudicating benefits claims under the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act. *Id.* at 2259. The "true doubt" rule shifted the burden of persuasion to the party opposing the benefits claim and, when the evidence was evenly balanced, the benefits claimant would win. *Id.* at 2253.

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showing to the contrary."); *Robison Energy, Inc.*, 14 DOE ¶ 83,028, 86,238 (1986) ("Respondents have presented no evidence to the contrary."); *Fuel Oil Supply and Terminaling, Inc.*, 13 DOE ¶ 86,239 (1985) (holding that individual was "in a far better position than the DOE" to present evidence).

This Court found that the drafters of the APA used the term "burden of proof" to mean the burden of persuasion, *id.* at 2257, and concluded, therefore, that the APA imposes the obligation on the proponent of a rule or order to persuade the "trier of facts" of the truth of a proposition which the proponent affirmatively asserts. *Id.* at 2256.

Here, the DOE totally failed to introduce any probative evidence of the amount of the HO&R's overcharges, if any, received by Imparato and, rather, relied on inferences that Imparato was required to refute at the administrative level. Thus, the DOE failed to prove the amount received by Imparato by a preponderance of the evidence, as mandated by the applicable statute. *See* 18 C.F.R. § 385.911 (1990) ("Rule 911"). The Federal Circuit's opinion conflicts with *Greenwich Collieries*.

The Federal Circuit failed to recognize that the DOE had both the burden of proof and the burden of persuasion. Imparato was not obligated to refute a total absence of evidence. The DOE's contentions at the administrative level establish that the Federal Circuit's and the District Court's rationale on this issue was erroneous. The DOE argued throughout this case that Imparato had "the burden of proof to provide evidence to support a defense of lack of receipt of benefits." *See* App. 14. But, on appeal to the FERC, the DOE had "the burden of proof with respect to disputed elements of [an] affirmative case. . . . " 18 C.F.R. § 385.911. The Federal Circuit, ignoring Rule 911, erroneously relied on *Mapco Int'l, Inc. v. Federal Energy Regulatory Comm'n*, 993 F.2d 235, 244-45 (Temp. Emer. Ct. App. 1993) to hold that there was no impermissible shift of the burden of proof. *Mapco*, however, did not deal with

the personal liability of corporate officers and has no application to this case.

This shift of the burden of proof to Imparato violated the applicable statutory requirements delineating the DOE's burden in agency proceedings and should not be sanctioned by this Court. *See Pel-Star Energy, Inc. v. United States Dep't of Energy*, 890 F. Supp. 532, 545-46 (W.D. La. 1995) (holding that the DOE failed to carry its burden of proof to pierce the corporate veil and criticizing any shift of the burden of proof). The court in *Pel-Star*, faced with similar facts, held that the "DOE cannot sustain its decision simply by noting that [the individual] failed to introduce evidence." *Id.* at 546. The Federal Circuit's decision erroneously ignored *Pel-Star*, which contains the correct analysis of the DOE's burden of proof. Shifting the burden to Imparato to disprove an element of the DOE's case violated Rule 911 and is contrary to *Greenwich Collieries*.

Absolutely nothing in FERC's regulations or the APA authorizes the DOE to force an individual to disprove that he received the benefits from the alleged corporate overcharges, particularly when it is an element of the DOE's burden of proof before the FERC. The DOE sought to justify its rationale for shifting the burden to Imparato for reasons of administrative efficiency. In contravention of all statutes imposing the burden of proof on the DOE, TECA has also pronounced that "[s]hifting the burden to one in [the individual's] position of responsibility aids the task of enforcement without working unfairness." *Sauder*, 648 F.2d at 1348. Nothing in Rule 911 or the APA, however, authorizes an administrative agency to shift the burden of proof and the burden of persuasion to an opponent of an order simply to make the agency's task

easier or less time consuming. This Court, therefore, should disapprove the language in *Sauder* which shifted the burden to the individual.

Simply relying on Imparato's status as a corporate shareholder did not discharge the DOE's burden to come forward with dispositive evidence on the issue. The record in this case does not contain a shred of evidence to support the Federal Circuit's finding that Imparato benefitted from the challenged transactions. *See J.R. Cone*, 33 FERC ¶ 61,125, 61,274 (1985) ("[N]o sanctions can be imposed or restitution ordered unless the fundamentals of due process and the basic rules of evidence are carefully observed. . . . In other words, the government has the ultimate burden of proof. . . . ").

This Court should reject the DOE's imposition of the burden of proof on Imparato to establish that he did not benefit as a result of HO&R's transactions. Such an imposition required Imparato to prove a negative and was inconsistent with the statutory requirements imposed on the DOE – to sustain the burden of proof and the burden of persuasion at all levels of the administrative process. *See* 10 C.F.R. § 205.192A (1980) *and* 18 C.F.R. § 385.911. Under the authority of Section 556 of the APA, the *Greenwich Collieries* opinion and the DOE's own rules and precedents, the Federal Circuit erred in failing to vacate the Final Order as to Imparato because the DOE failed to sustain its burden of proof and then shifted the burden to Imparato to disprove an element of the DOE's case.

E. The DOE Erred In Applying "Federal Common Law" Principles

The DOE held Imparato liable under the "central figure" theory of liability, which purports to impose liability on Imparato as a result of his alleged personal involvement in what the DOE claims was HO&R's illegal conduct. The Federal Circuit held that "federal common law" allows the DOE to find a corporate officer or director liable under the so-called central figure theory as an actor, not as an owner.

In imposing personal liability, the Federal Circuit relied on TECA's decision in *United States v. Sutton*, stating that personal liability was premised upon the central figure theory and depended only upon the individual's acts. In *Sutton*, TECA noted that when dealing with corporate violations of DOE regulations, "federal common law, not state law controls." 795 F.2d at 1060 n.15.

This Court recently revisited the parameters of this body of law and flatly concluded: "There is no federal general common law. . . . " *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 114 S. Ct. 2048, 2053 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938)). In *O'Melveny*, the FDIC contended that a federal common law rule rather than California law on imputation of knowledge determined whether the knowledge of corporate officers acting against a corporation's interests was imputed to the corporation. *Id.* at 2052. This Court summarily rejected the notion that federal common law governed such a generalized issue and held that California

law was to be applied regarding the imputation of knowledge to victims of alleged corporate negligence. *Id.* at 2053.

In this case, the government has advanced no valid reason why the imposition of personal liability for corporate actions should be governed by so-called federal common law rather than by state law. Indeed, none exists for the simple reason that the EPAA did not change existing case law relating to the liability of corporate officers. *See* S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 200. Consequently, the Federal Circuit's opinion in this case is in fatal conflict with *O'Melveny*.

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448 (1979), this Court declined "to override intricate state laws of general applicability on which private creditors base their daily commercial transactions" in favor of the "nationwide standard" proposed by the FDIC concerning priority of liens. 440 U.S. at 729-30, 99 S.Ct. at 1459 (1979). In this case, the imposition of personal liability on a corporate officer in a manner that ignores all tenets of state corporate law was plainly incorrect – especially in the face of the EPAA's legislative history that the statute was not intended to change existing case law on the subject. The Federal Circuit did not identify, and cannot identify, a significant conflict between the identifiable federal policy or interests behind the ESA and the EPAA, and the use of state corporate law principles. *See also Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82 (5th Cir. 1990) ("Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law.").

The Federal Circuit's attempt to distinguish *O'Melveny* by stating it concerned a state cause of action is based on fallacious reasoning. It does not matter that *O'Melveny* proceeded under state law theories. The question in *O'Melveny*, as it is here, is whether state law principles relating to the corporate form, shareholder liability, or imputation of knowledge are to be governed by state law or federal principles in an action which the United States or one of its agencies is involved. According to the EPAA's legislative history, existing case law relating to individual responsibility still controls. Under *Erie*, this is state law, not the unsupported rule of law promulgated by TECA and furthered by the Federal Circuit. In short, the Federal Circuit has now promulgated a rule of federal common law amounting to automatic personal liability for corporate officers for corporate liabilities. This is patently erroneous. Consequently, this Court should grant this petition for writ of certiorari.

CONCLUSION

Congress authorized courts to order restitution of moneys received in violation of the ESA or the EPAA. In so doing, however, Congress did not countenance a complete departure from established law articulating the exceptions from the concept of limited liability of corporate officers, directors, and shareholders. The bureaucracy charged with the enforcement of these laws and the courts that grade the papers of that bureaucracy have done just that in the zeal that has come to typify agency action by the Department of Energy. The Federal Circuit has now set forth a rule of law which states that if a

corporation receives money in excess of that permitted by law, the officers of the corporation are presumptively liable, jointly and severally, for the full amount of the money received by the corporation even in the absence of evidence that the officers received any of the money. In the absence of evidence showing culpability and receipt of benefit, this rule of law cannot stand.

For the reasons stated, this Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A

HOUSTON OIL & REFINING, INC. and Joseph A. Imparato, Plaintiffs-Appellants,

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION, United States Department of Energy, Hazel O'Leary, Secretary of Energy, and The United States, Defendants-Appellees.

No. 95-1354.

United States Court of Appeals, Federal Circuit.

Sept. 10, 1996.

Marvin C. Moos, Keck, Mahin & Cate, Houston, Texas, argued for plaintiffs-appellants. With him on the brief was Grant Cook, Brown, Parker & Leahy, L.L.P.

Don W. Crockett, Office of General Counsel, U.S. Department of Energy, Washington, DC, argued for defendants-appellees.

Before NEWMAN, MICHEL, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

This appeal arises from a remedial order ("RO") issued by the Federal Energy Regulatory Commission ("FERC") and affirmed by the United States District Court for the Southern District of Texas. On April 29, 1988, the Department of Energy ("DOE") issued a RO (i) finding that Houston Oil and Refining, Inc. ("Houston") had violated 10 C.F.R. § 212.186 (1980) (the "layering

regulation"), a crude oil resale regulation, and (ii) ordering restitution of overcharges. *Houston Oil & Refining, Inc.*, 17 DOE (CCH) ¶ 83,011 (1988). The RO held Houston and Joseph A. Imparato ("Imparato") jointly and severally liable for the restitution. *Id.* at 86,132-35. FERC affirmed the RO, *Houston Oil & Refining, Inc.*, 65 FERC (CCH) ¶ 61,022 (1993), and Houston and Imparato appealed to the district court. On March 15, 1995, the court granted DOE's motion for summary judgment, affirmed FERC's RO, and entered judgment requiring Houston and Imparato to disgorge as restitution $57,989,722.44, plus interest. *Houston Oil & Refining, Inc. v. Department of Energy*, No. H-93-3836 (S.D.Tex. Mar. 15, 1995). On May 15, 1995, Houston and Imparato appealed concurrently to the Courts of Appeals for the Federal Circuit and the Fifth Circuit. The Fifth Circuit granted DOE's motion to dismiss the appeal for lack of jurisdiction. *Houston Oil & Refining, Inc. v. FERC*, No. 95-20394 (5th Cir. June 28, 1995). Houston and Imparato challenge both our jurisdiction and the decision of the district court on the merits. For the reasons set forth below, we (i) hold that we have jurisdiction and (ii) affirm the decision of the district court affirming FERC's RO.

BACKGROUND

As we recounted in *Phoenix Petroleum Co. v. FERC*, Nos. 95-1279, 95-1282, ___ F.3d ___ (Fed.Cir.1996), also decided today, in 1971 President Nixon imposed wage and price controls under the authority of the Economic Stabilization Act of 1970 ("ESA"), Pub.L. No. 91-379, 84 Stat. 799 (1970) (codified as amended at 12 U.S.C. §§ 1901-1910 note (1994)). ___ F.3d at ___, slip op. at 5. In

1973, the Emergency Petroleum Allocation Act of 1973 ("EPAA") was enacted. Pub.L. No. 93-159, 87 Stat. 627 (1973) (codified as amended, but omitted, at 15 U.S.C. §§ 751 *et seq.* (1994)). That statute, which incorporated by reference portions of the ESA, required the President to promulgate regulations providing for the mandatory allocation of crude oil, in amounts and at prices specified in the regulations. *Phoenix*, ___ F.3d at ___, slip op. at 6-7; *Bonray Oil Co. v. Department of Energy*, 472 F.Supp. 899, 900-01 (W.D.Okla.1978), *aff'd*, 601 F.2d 1191 (Temp.Emer.Ct.App.1979). The President's authority under the EPAA expired on September 30, 1981. Energy Policy and Conservation Act, Pub.L. No. 94-163, § 461, 89 Stat. 871, 955 (1975); *Texas American Oil Corp. v. Department of Energy*, 44 F.3d 1557, 1562 (Fed.Cir.1995) (in banc). However, a savings provision in the EPAA provided that expiration of the President's authority did not affect pending enforcement proceedings or enforcement proceedings, such as the present one, based upon acts committed or liability incurred prior to the expiration date. EPAA § 18, 89 Stat. at 955; *Texas American*, 44 F.3d at 1562.

The regulations controlling the allocation and price of crude oil were enforced by DOE and its predecessors, the Cost of Living Council, the Federal Energy Office, and the Federal Energy Administration. *Phoenix*, ___ F.3d at ___, slip op. at 5-9. FERC is charged with reviewing EPAA ROs issued by DOE. 42 U.S.C. § 7193. After such review, FERC issues an order affirming, modifying, or vacating the remedial order. For purposes of judicial review, the FERC order constitutes a final agency action. *Id.* The FERC decision initially is reviewed in a United States district court. *See* 42 U.S.C. § 7193(c); 42 U.S.C. § 7192(a);

ESA § 211(a), 85 Stat. at 748-49. Prior to April 29, 1993, review of the district court decision was within the jurisdiction of the Temporary Emergency Court of Appeals ("TECA"). *Phoenix*, ___ F.3d at ___, slip op. at 4-11. Effective that date, however, TECA was abolished, and all remaining actions within its jurisdiction were transferred to this court. Federal Courts Administration Act of 1992 ("FCAA"), Pub.L. No. 102-572, § 102, 106 Stat. 4506, 4506-07 (1992); *Texas American*, 44 F.3d at 1561. At the same time, the jurisdiction of the Federal Circuit was expanded to add appeals arising under the EPAA/ESA. FCAA § 102(c) 106 Stat. at 4507; *see* 28 U.S.C. § 1295(a)(11)-(12) (1994).

In *MAPCO Int'l Inc. v. FERC*, 993 F.2d 235 (Temp.Emer.Ct.App.1993), TECA recounted the circumstances which led to the layering regulation, which is at issue in this case.

> In the latter half of the 1970s there was a large increase in the number of [crude oil] resellers and a change from the traditional reselling activities of gathering, storing and transporting crude oil, as they had historically done in the past, to an almost instantaneous transfer of title from a seller to a buyer. In response the DOE promulgated a new set of regulations in 1978, designated 10 C.F.R. Part 212, Subpart L, that applied to resales of crude oil. In general, the regulations were established to limit the legitimate resellers (those gathering and moving the crude oil) to a "permissible average markup" (PAM) of their prices each month, and to deny price markups for resales in which no legitimate reselling service was performed. This latter activity, which inflated prices

> of crude oil when none of the services traditionally associated with resale of crude oil was performed, is called "layering." The layering rule [prohibited layering]. 42 Fed.Reg. 64856, 64865 (December 29, 1977), reprinted at 10 C.F.R. § 212.186.

993 F.2d at 238.

In this case, DOE found that Houston was a Texas corporation organized in May 1979, and that it conducted its first crude oil transaction in June 1979. During the period June 1979 through August 1980, Houston engaged in the trade or business of purchasing crude oil and reselling it, without substantially changing its form, to purchasers other than consumers. *Houston Oil*, 17 DOE at 86,123-24. During that time, Imparato was Houston's president and sole stockholder. *Id.* at 86,134. It was uncontested that Houston sold the oil at prices in excess of those at which it was acquired. *Id.* at 86,124. DOE determined that Houston had violated the layering regulation and ordered restitution of the overcharges. *Id.* at 86,130-32, 86,135. Imparato was held to be jointly and severally liable for the violations under the "central figure" theory of liability because of his personal involvement in the illegal conduct. *Id.* at 86,132-35. This appeal is before us because FERC and the district court have denied Houston's and Imparato's appeals to set aside the RO.

DISCUSSION

Houston and Imparato argue first that we lack jurisdiction over their entire appeal. Alternatively, they contend that we at least lack jurisdiction with respect to

certain of the issues they raise. On the merits, they argue that FERC improperly shifted the burden of proof from DOE and that the layering regulation is invalid and unenforceable. They also contend that DOE lacked statutory and constitutional authority to impose personal liability upon Imparato. Finally, they argue that the RO must be set aside because it is based on invalid "federal common law" principles, violates Article III of the Constitution, and is contrary to Imparato's Seventh Amendment jury trial right.

I. Jurisdiction

The Department of Energy Organization Act ("DOE Act"), Pub.L. No. 95-91, 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7101 *et seq.* (1994)), established DOE and FERC. According to Houston and Imparato, we only have jurisdiction commensurate with that which could have been exercised by TECA, and TECA could not have exercised jurisdiction over this case because it does not arise under the EPAA/ESA, but, rather, under the DOE Act. Houston and Imparato argue that we lack jurisdiction over the appeal because the FERC RO was issued under the exclusive authority of section 503(c) of the DOE Act, 42 U.S.C. section 7193(c). Alternatively, they argue that we lack jurisdiction over specific issues raised in the appeal, because the issues do not involve matters under the ESA or EPAA. These alleged non-EPAA/ESA issues are whether FERC improperly shifted the burden of proof and whether Imparato can be held jointly and severally liable for Houston's violations of the layering regulation. Houston and Imparato contend that this appeal, or the

specific non-EPAA/ESA issues, at least, should be transferred to the Fifth Circuit.

In *Phoenix*, we were presented with a similar challenge to our jurisdiction. The *Phoenix* appellants advanced, but in more detail, the same arguments raised by Houston and Imparato. ___ F.3d at ___, slip op. at 13-20. As in *Phoenix*, we reject the request to transfer this appeal, in whole or in part, back to the Fifth Circuit.

In brief, in order for us to dismiss this appeal in favor of the Fifth Circuit, we would have to find, pursuant to *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988), that the Fifth Circuit's decision to dismiss in favor of our court was not plausible. 486 U.S. at 819, 108 S.Ct. at 2179. The Fifth Circuit's decision to dismiss in favor of this court was plausible, because this appeal meets our threshold requirements for jurisdiction. Resolution of the merits – whether to set aside the FERC RO holding Houston and Imparato jointly and severally liable for Houston's EPAA/ESA violations – requires application or interpretation of the EPAA/ESA or related regulations, see Part III B, post, and this EPAA/ESA issue was adjudicated in the district court. *See Texas American*, 44 F.3d at 1563-64 (summarizing TECA threshold jurisdictional requirements). We also reject the argument of Houston and Imparato that we lack jurisdiction over certain issues. Neither the issue of Imparato's liability nor the burden of proof issue is a non-EPAA/ESA issue. *Phoenix*, ___ F.3d at ___ n. 5, slip op. at 19 n. 5. Each is an EPAA/ESA issue that was adjudicated in the district court.

II. Standard of Review

In *Texas American*, this court, sitting in banc, adopted as precedent the body of law represented by the holdings of TECA. 44 F.3d at 1561. We review the district court's summary judgment decision *de novo*. *MAPCO*, 993 F.2d at 239. An EPAA/ESA FERC RO will be enjoined or set aside only if it is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence. *Phoenix*, ___ F.3d at ___, slip op. at 22; *MAPCO*, 993 F.2d at 239. We accord the agency's determination great deference and will approve the decision if there is a rational basis for it. *Phoenix*, ___ F.3d at ___, slip op. at 22; *MAPCO*, 993 F.2d at 239.

III. The Appeal of the Remedial Order

Houston and Imparato challenge the FERC RO on three grounds, each of which was rejected by both FERC and the district court. Two of those grounds were asserted by the appellants in *Phoenix* and *MAPCO:* the contention that FERC improperly shifted the burden of proof with respect to proving a violation of the layering regulation; and the contention that the layering regulation is invalid and unenforceable. *See Phoenix*, ___ F.3d at ___, slip op. at 25-26; *MAPCO*, 993 F.2d at 239-45. The third ground for the appeal is that FERC erred in holding Imparato jointly and severally liable with Houston for restitution of Houston's overcharges. We briefly discuss the first two issues before addressing the personal liability issue.

A. The Burden of Proof and Validity of the Regulation

According to Houston and Imparato, FERC improperly shifted the burden of proof as to whether Houston had violated the layering regulation. Their arguments on this point are substantially the same as those advanced by the appellants in *Phoenix* and *MAPCO* and must be rejected. There was no shifting of the burden of proof. Houston and Imparato have "simply failed to defend against the government's evidence of . . . overcharge violations." *MAPCO*, 993 F.2d at 245; *Phoenix*, ___ F.3d ___, slip op. at 25-26.[1]

In arguing that the layering regulation is invalid, Houston and Imparato contend that the district court erred in rejecting their argument that the regulation is void for vagueness. In support of their argument, they rely upon the Supreme Court's decision in *Connally v.*

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[1] The DOE summarized the evidence as follows.

> It is undisputed that [Houston's] resales of crude oil were carried out through paper transfers of ownership that occurred as the shipments of crude oil were being transported either through a common carrier pipeline or on board a ship or at the instant the crude oil left the ship at the terminal. These in-line and in-ship transfers involved the simultaneous acquisition and transfer of title to the crude oil by [Houston]. It is also undisputed that [Houston] sold the crude oil at prices in excess of those at which it acquired the oil. There is no indication in the record that [Houston] physically gathered, transported or stored the crude oil, or paid any fees for the physical gathering, transportation or storage of the crude oil.

Houston Oil, 17 DOE at 86,124.

General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (citing *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221, 34 S.Ct. 853, 854-55, 58 L.Ed. 1284 (1914) and *Collins v. Kentucky*, 234 U.S. 634, 34 S.Ct. 924, 58 L.Ed. 1510 (1914))). The layering regulation provides in pertinent part as follows:

> The price for crude oil charged by a reseller which in a sale performs no *service or other function traditionally and historically associated with the resale of crude oil* shall not exceed the actual price paid by the reseller for the crude oil. . . .

10 C.F.R. § 212.186 (1980) (emphasis added); *MAPCO*, 993 F.2d at 238. Houston and Imparato argue that the key phrase "service or other function traditionally and historically associated with the resale of crude oil" is impermissibly vague.

In rejecting this argument, the district court relied on *MAPCO*. There, the crude oil reseller, MAPCO, argued that the notice adopting the layering regulation was insufficient. 993 F.2d at 239-40. At issue was the meaning of the traditional and historical service or other function phrase. *Id.* at 241-42. En route to upholding the district court's determination that DOE fulfilled notice and comment requirements for the regulation, TECA noted two Notices of Proposed Rulemaking ("NOPR") issued with respect to the regulation. *Id.* at 241-42. TECA recounted that

> the August 1977 NOPR reiterated the agency position expressed in its first NOPR, issued October 29, 1976, that "crude oil resellers provide basically a gathering and transportation service." It then proposed amendments and interpretative rulings to the price regulations to clarify that layering practices are not permitted. It explicitly described "layering" as "the insertion of one or more 'resellers' between the producer and refiner and the charging of one or more markups, where the 'layering' firm performs no service or other function traditionally and historically associated with the resale of crude oil." 42 Fed.Reg. 41256, 41262 (August 15, 1977).

MAPCO, 993 F.2d at 242. The court also stated that "MAPCO knew or should have known that its activities were not services traditionally and historically associated with the reselling of crude oil." *Id.* at 244.

In this case, Houston and Imparato attempt to get around *MAPCO* by arguing unconstitutional vagueness instead of failure of notice. *MAPCO* is not so easily avoided, however, for in that case TECA noted that the agency twice iterated its position that "crude oil resellers provide basically a gathering and transportation service." *Id.* at 242. TECA, therefore, found that the agency rather clearly stated its position that the traditional and historical service or function of a crude oil reseller is gathering and transporting. In *United States v. Sutton*, 795 F.2d 1040 (Temp.Emer.Ct.App.1986), *cert. denied*, 479 U.S. 1030, 107 S.Ct. 873, 93 L.Ed.2d 828 (1987), TECA rejected the argument that 10 C.F.R. § 212.131, another crude oil reseller regulation, was unconstitutionally vague. TECA noted that the Supreme Court "pointed out that the degree of

vagueness that the Constitution will tolerate depends in part upon 'the nature of the enactment' " and that " 'economic regulation is subject to a less strict vagueness test.' " *Sutton*, 795 F.2d at 1054, quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). In light of *MAPCO* and *Sutton*, we have no difficulty concluding that the layering regulation is not unconstitutionally vague.

B. Liability of Imparato for Houston's violations

1. The DOE and FERC Decisions

DOE found Imparato personally liable for Houston's layering violations under the "central figure" or "animating force" theory of liability.[2] *Houston Oil*, 17 DOE at 86,132-35. This liability was imposed on Imparato because of his personal involvement in Houston's illegal conduct. DOE concluded that its authority to impose this liability was based on its broad authority to order restitution for regulatory violations under section 209 of the ESA, which read as follows:

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[2] In so finding, DOE's Office of Hearings and Appeals ("OHA") affirmed the Proposed Remedial Order ("PRO") issued by the agency's Economic and Regulatory Administration ("ERA"). The OHA then issued a final DOE RO. *Houston Oil*, 17 DOE at 86,123, 86,136-37. It was this RO that then was the subject of the FERC proceedings, with review by an Administrative Law Judge ("ALJ"), *Houston Oil & Refining, Inc.*, 46 FERC (CCH) ¶ 63,022, and then by the full Commission, *Houston Oil*, 65 FERC ¶ 61,022.

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged . . . in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices. . . . In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

85 Stat. at 748. While section 209 pertained to district courts, DOE read TECA precedent as holding that the section grants DOE authority to order restitution of overcharges. *Houston Oil*, 17 DOE at 86,132 n. 9, citing *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 721-23 (Temp.Emer.Ct.App.), *cert. denied*, 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982); *Bonray*, 472 F.Supp. at 903-905.

DOE also noted that restitution is equitable in nature and "is usually thought of as a remedy by which [a] defendant is made to disgorge ill-gotten gains *or to restore the status quo*, or to accomplish both objectives." *Houston Oil*, 17 DOE at 86,132-33 (quoting *Sauder v. Department of Energy*, 648 F.2d 1341, 1348 (Temp.Emer.Ct.App.1981) (quoting 5 Moore's Federal Practice ¶ 38.24[2])). DOE employed a two-prong test to determine whether Imparato would be held personally liable as a "central figure" for Houston's regulatory violations. *Houston Oil*, 17 DOE at 86,133. Under this test, a corporate officer will be held liable if it is shown that (1) the officer exercised personal control of the firm's regulated operations or participated

in the transactions in which the overcharges occurred; and (2) the officer personally benefitted from the overcharges. DOE rejected the argument that Imparato could not be held personally liable as a central figure unless he intentionally committed a tort, as well as the argument that a central figure's liability is limited to the amount of benefits actually received. *Id.* at 86,133-35. It found that Imparato was the central figure who had personal control and participated in the overcharges that violated the regulations. *Id.* at 86,134. Thus, the first prong of the two-prong test was met.

With respect to the second prong – the agency must show that the officer personally benefitted from the overcharges – DOE found that it was proved as follows:

> [There was] a *prima facie* showing that Imparato benefitted from the overcharges. In previous decisions we have acknowledged that ownership or control of a firm's operation at the time of the alleged violations implies the receipt of a personal benefit. *T & M Petroleum [Corp.]*, 15 DOE [¶ 83,021] at 86,255 [(1987)]; *Robison Energy Corp.*, 14 DOE ¶ 83,028 at 86,238 (1986). . . . Similarly, we find in this proceeding that no evidence exists to suggest that [Houston] was not organized for profit, or that [Houston] did not earn a profit from the layering overcharges. Thus, we can infer from Imparato's control and ownership of [Houston] during the audit period that he benefitted from the more than $150,000,000 in overcharges established in the PRO which are uncontroverted by [Houston]. [Houston] has made no showing to the contrary.

Houston Oil, 17 DOE at 86,134-35. Therefore, DOE held that Imparato, as central figure and animating force in the

violations, should be held jointly and severally liable for all of Houston's overcharges. *Id.* at 86,135.

On appeal before the FERC ALJ, Houston and Imparato raised two new arguments. *Houston Oil,* 46 FERC at 65,083. The first was that imposing personal liability on Imparato was not a restitutionary remedy, but a penalty that could only be heard as a common law action by an Article III court. The ALJ rejected this argument because he found the decision to be "perfectly proper and in accordance with established law and precedent." *Id.* Houston and Imparato also contended that DOE improperly imposed liability, because it failed to follow *Citronelle-Mobile Gathering, Inc. v. Herrington,* 826 F.2d 16, 23-25 (Temp.Emer.Ct.App.), *cert. denied sub. nom. Chamberlain v. United States,* 484 U.S. 943, 108 S.Ct. 327, 98 L.Ed.2d 355 (1987), and condition its finding of liability upon " 'the particular circumstances and facts' of this proceeding, with regard to the demonstrated 'equities.' " *Houston Oil,* 46 FERC at 65,083. This argument was "easily put to rest" by the ALJ, because no equities were argued or identified before DOE. The ALJ found that DOE had convincingly established that no equities were present on the record before him or DOE that would mitigate against imposition of personal liability on Imparato for Houston's violations. *Id.*

Houston and Imparato appealed to FERC, but did not challenge the facts that established that Imparato was a "central figure" in Houston's violations of the layering regulation. *Houston Oil,* 65 FERC at 61,284-85. Instead, they argued that DOE had failed to put forward evidence concerning mitigation of the restitutionary amount. TECA had stated that "because restitution is an equitable

remedy, we would be careful to condition a finding of personal liability on the particular circumstances and equities of each case." *Id.* at 61,285 n. 19 (quoting *Citronelle-Mobile*, 826 F.2d at 25). FERC concluded that raising mitigating facts – "the particular circumstances and equities of each case" – was an affirmative defense that Houston and Imparato had to plead. The ALJ had considered the equities, and found that Imparato had not put forward any equities that might have weighed against imposing personal liability. *Id.* at 61,285.

Houston and Imparato also renewed their common law/Article III argument. They claimed that DOE had imposed liability based on tort law, which could only be done by an Article III court. FERC rejected this argument and held that, under *Citronelle-Mobile*, the decision to impose central figure liability is based on the finding that the conduct of an individual violated law or regulation; it is not dependent on findings that establish the elements of common law torts. *Id.*, citing *Citronelle-Mobile*, 826 F.2d at 25. In FERC's view, DOE was enforcing federal pricing regulations in light of Imparato's conduct; it was not bringing a common law tort action against Imparato. *Houston Oil*, 65 FERC at 61,285.

On appeal, Houston and Imparato raise essentially two issues: (1) whether DOE acted in excess of its authority when it imposed personal liability on Imparato for Houston's violations of the EPAA/ESA regulations, and (2) whether DOE erred when it decided to impose personal liability on Imparato based on its finding that he benefited from Houston's overcharges.

2. DOE's Authority to Impose Personal Liability

In arguing that DOE did not possess statutory authority to impose personal liability on Imparato, Houston and Imparato contend that section 209 of the ESA, which is quoted above, only authorized enforcement actions in the district courts, and that this court has established a clear rule regarding the scope of an agency's jurisdiction. They cite *Killip v. Office of Personnel Management*, 991 F.2d 1564 (Fed.Cir.1993), in which we stated that "[a]ny and all authority pursuant to which an agency may act ultimately must be grounded in an *express* grant from Congress." 991 F.2d at 1569 (emphasis added). As the ESA limited enforcement to actions brought in district courts, they argue DOE had no authority to proceed against Imparato for personal liability at the agency level.

DOE counters that TECA held that DOE has the authority to issue ROs to individuals. In *Sauder*, as in this case, DOE issued an RO against Sauder as an animating force. On appeal, TECA rejected Sauder's assertions that DOE had no authority to do so. *Sauder*, 648 F.2d at 1347-49. DOE also argues that Congress left no doubt whatsoever about DOE's role in enforcing the ESA when it passed the DOE Act. According to DOE, section 503 of the DOE Act explicitly vested DOE and FERC with authority to adjudicate allegations that the EPAA/ESA regulations had been violated and to order appropriate relief.

We conclude that DOE does have statutory authority to impose liability upon a "central figure" such as Imparato; and, consistent with *Killip*, we further conclude that DOE's authority is grounded in an express grant from Congress. The agency action which we review was undertaken pursuant to 42 U.S.C. § 7193. Section 7193(a) states that "[i]f upon investigation [DOE] believes that a person has violated any regulation, rule, or order . . . promulgated pursuant to the [EPAA], [DOE] may issue a remedial order to the person."[3] Section 7193(c) provides for review of the DOE RO by FERC. After such review, FERC "shall . . . issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's remedial order, or directing other appropriate relief." 42 U.S.C. § 7193(c). For the purposes of judicial review, the FERC order constitutes a final agency action. *Id.*

"An agency is but a creature of statute" that has no "greater authority than that conferred under the governing statute." *Killip*, 991 F.2d at 1569. In this case, we are reviewing an agency action which was undertaken pursuant to 42 U.S.C. § 7193 in order to enforce the EPAA/ESA regulations. As we read section 7193, Congress has expressly granted DOE the authority to enforce the EPAA/ESA by issuing an RO. We therefore conclude that DOE has an express grant of statutory authority to issue an RO to enforce the EPAA/ESA and the related regulations.

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[3] As noted above, the EPAA incorporated by reference certain provisions of the ESA. Among those provisions was section 209 of the ESA. EPAA § 5, 87 Stat. at 633.

The additional arguments that Houston and Imparato raise against DOE's authority lack merit. It is argued first that DOE had no authority to impose central figure liability on Imparato, because the central figure theory is dependant upon "federal common law" principles rejected by the Supreme Court in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). In *O'Melveny*, the Court stated that "[t]here is no federal general common law." 512 U.S. at ___, 114 S.Ct. at 2053 (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938)).

We reject Imparato's "federal common law" argument that *O'Melveny* overrules TECA caselaw on central figure liability. In *O'Melveny*, the "federal general common law" issue arose because the Federal Deposit Insurance Corporation, as receiver of a federally insured bank, had sued O'Melveny in a federal district court alleging *state* causes of action. *Id.* at ___-___, 114 S.Ct. at 2051-52. The Court decided the question of whether a federal-law or state-law rule of decision governed the tort liability of attorneys who provided services to the bank. *Id.* at ___, 114 S.Ct. at 2051.

In this case, there is no state cause of action. We are reviewing a DOE agency action undertaken pursuant to one federal law, the DOE Act, in order to enforce federal regulations issued under another federal law, the EPAA/ESA. We are not reviewing a case where a federal-law rule of decision is asserted in connection with a state cause of action. *O'Melveny* is inapposite.

Houston's and Imparato's remaining arguments as to DOE's authority are grounded in the argument that DOE,

an agency, unconstitutionally adjudicated a common law tort, in violation of Article III of the Constitution and contrary to Imparato's right to a jury trial under the Seventh Amendment. These arguments fail because TECA held in *Citronelle-Mobile* that central figure liability is not dependent upon establishing the elements of a common law tort. 826 F.2d at 25. Rather, the liability attaches because the individual acted in violation of the EPAA/ESA and its accompanying regulations. *Id.* With respect to the related question of a right to a jury trial, TECA succinctly held in *Sutton* that "[a]n award of restitution is an equitable remedy, and not a penalty. Under such circumstances, the district court properly denied Sutton's request for a jury trial." 795 F.2d at 1061.

For the foregoing reasons, we hold that DOE had authority to impose central figure personal liability upon Imparato for Houston's overcharges in violation of the EPAA/ESA. We turn next to the question of whether FERC erred in upholding DOE's decision to impose personal liability on Imparato under the central figure theory.

3. DOE Properly Decided to Impose Personal Liability

As noted above, DOE imposed personal liability on Imparato after employing a two-prong test. It based the test upon *Citronelle-Mobile* and *Sutton*. *Houston Oil*, 17 DOE at 86,133. In *Citronelle-Mobile*, TECA held that

> personal responsibility for corporate liability may attach when the individual's wrongful conduct causes the violation of a statute and accompanying regulations such as the crude oil pricing laws. But because restitution is an equitable remedy, we would be careful to condition a finding of personal liability on the particular circumstances and equities of each case.

826 F.2d at 25. Thus, TECA conditioned central figure liability on two findings: (1) the individual must be found to have caused a violation; and (2) under the circumstances and equities of the case, it is equitable to impose liability. In *Sutton*, TECA held that "[a] person who is the 'animating force' for regulatory violations is fully liable even though he does not personally receive all benefits of his illegal activities." 795 F.2d at 1063.

Pursuant to *Citronelle-Mobile* and *Sutton*, if DOE seeks to impose central figure liability upon an individual, it must show that (1) the individual exercised personal control of the firm's regulated operations or participated in the transactions in which the overcharges occurred, and (2) the individual personally benefitted from the overcharges. *See Citronelle-Mobile*, 826 F.2d at 25; *Sutton*, 795 F.2d at 1063; *The Crude Co.*, 65 FERC (CCH) ¶ 61,214 (1993). In addition, any finding of central figure liability must be conditioned upon the circumstances and equities of the case.[4] *Citronelle-Mobile*, 826 F.2d at 25.

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[4] As recounted above, Houston and Imparato argued before FERC that DOE failed to consider the particular circumstances and equities of the case. They apparently did not raise this issue before the district court and have not raised it on appeal to this court.

On appeal, Houston and Imparato do not argue that DOE improperly found that Imparato met the first prong of the central figure liability test – that he was a central figure in Houston's overcharges. *See Houston*, 65 FERC at 61,284-85. Rather, their main argument is that the second prong was not properly proved – that Imparato personally benefitted from the overcharges.[5]

Houston and Imparato argue that DOE imposed personal liability without any evidence that Imparato ever received "even one dollar" of the overcharges. The only evidence proffered by DOE, they claim, was that (1) Imparato was the president and 100 percent shareholder of Houston during the period of the overcharges; (2) he acknowledged that he was "familiar with" the transactions that resulted in overcharges; (3) he signed

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[5] It also is argued that even if Imparato is liable for restitution under the central figure theory, the law of restitution does not allow recovery in excess of money received. TECA consistently rejected the argument. *See Sauder*, 648 F.2d at 1347-48 (As Sauder was animating force that caused the overcharges, it was within agency authority and discretion to hold him, as largest interest owner and operator, liable for the full amount of the overcharge.); *Sutton*, 795 F.2d at 1063 ("Sutton's liability . . . is certainly not to be limited to the money he actually put in his pocket. A person who is the 'animating force' for regulatory violations is fully liable even though he does not personally receive all benefits of his illegal activities."); *Citronelle-Mobile*, 826 F.2d at 23-28 (holding president of corporation fully liable for overcharges because he was the "animating force" behind the sale of the oil); *Pratt v. Watkins*, 946 F.2d 907, 910 (Temp.Emer.Ct.App.1991) ("Since *Sauder*, this court has ordered a party to pay restitution in excess of charges actually received only if that party was the 'animating force' behind the sale of the oil.") (emphasis omitted).

Houston's monthly Crude Oil Reseller Self-Reporting Forms (Forms ERA-69) filed with DOE and was listed as the person responsible for preparing and filing the forms on behalf of Houston; and (4) he was the only person at Houston involved in setting crude oil selling prices. Houston and Imparato contend that because DOE failed to present any evidence of benefits he received, it improperly shifted the burden of proof. They assert that DOE erroneously inferred from Imparato's ownership of Houston that Imparato benefitted from the regulatory violations and that DOE therefore improperly placed the burden on him to establish the negative – that he did not benefit from the overcharges. Thus, absent the improper shifting of the burden of proof, DOE failed to prove that Imparato personally benefitted from Houston's overcharges. This contention is without merit.

In *MAPCO,* TECA rejected the argument that DOE improperly shifted the burden of proof with respect to proving that in-line transactions violated the layering regulation. 993 F.2d at 244-45. TECA held that DOE had met its burden of proof when it established that MAPCO had engaged in in-line transactions and MAPCO failed to prove that it had performed a traditional resale service or function. *Id.*

Similarly, DOE here decided that a *prima facie* showing was made that Imparato benefitted from the overcharges. *Houston Oil,* 17 DOE at 86,134-35. It did so after finding that Imparato was the president and 100% owner of Houston during the period of the overcharges. *Id.* at 86,134. It found no evidence existed to suggest that Houston was not operated for profit, or that Houston did not earn a profit from the overcharges. *Id.* at 86,135. Thus,

DOE found that it "can infer from Imparato's control and ownership of [Houston] . . . that he benefitted from the more than $150,000,000 in overcharges established [and] uncontroverted by [Houston]. [Houston] has made no showing to the contrary." *Id.*

We agree that DOE "made a *prima facie* showing that Imparato [personally] benefitted from the overcharges." *Id.* at 86,134. First, we note that the record indicates that Houston was a corporation organized in May 1979, and that it conducted its first crude oil transaction in the next immediate month, June 1979. *Id.* at 86,124. The overcharges at issue in this case occurred during the period June 1979 through August 1980. *Id.* at 86,123. In short, almost immediately after Houston was organized, it began engaging in transactions in violation of the layering regulation. Secondly, Houston has not challenged the amount of alleged violations or the manner in which the amount was calculated. DOE found that Houston's gross profits from the layering overcharges was almost $58 million. Lastly, and most importantly, the record indicates that Imparato was the president and 100% owner of Houston during the period of overcharges.

In sum, Imparato's solely owned corporation collected almost $58 million in overcharges, and there is no evidence as to where those funds went. The inescapable inference is that Imparato personally benefitted from the overcharges. If the overcharges remained in the accounts of his wholly owned corporation, Imparato would have directly benefitted by the increased value of the corporation. On the other hand, if the funds were distributed as salary or dividends to the sole shareholder, Imparato also

would have directly benefitted. In the event that Imparato otherwise distributed the funds, for example by directing them to other corporate employees in the form of increased compensation or perhaps by making corporate charitable contributions, Imparato would still have personally benefitted, albeit indirectly. We need not determine, however, what in fact was Imparato's *ultimate* personal benefit. Given the *prima facie* showing of personal benefit, Imparato had to defend himself. There is no merit to the claim that "the burden of proof was wrongly shifted. There was no shifting; [Imparato] simply failed to defend against the government's evidence." *MAPCO*, 993 F.2d at 245.[6] In sum, given the record and DOE's finding that Imparato personally benefitted as the president and sole owner of a corporation which received almost $58 million in gross profits on crude oil overcharges, we find

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[6] Houston and Imparato also argue that TECA's decision in *Pratt*, 946 F.2d 907, supports their position on the burden of proof issue. In that case, the district court held that DOE, not Pratt, a crude oil interest owner, had the burden of proof and that DOE presented no evidence that Pratt received the overcharges. TECA affirmed and noted that "[t]o allow the DOE to meet its burden merely by proving that Pratt was entitled to a benefit would be to eviscerate the doctrine of restitution." *Id.* at 911.

Houston and Imparato cannot rely on *Pratt*, however, because *Pratt* was not a case where DOE sought to impose central figure liability upon an individual. Unlike Imparato, Pratt was a passive interest owner. Pratt had the right to receive a share of oil sale proceeds, but he played no role in, and had no control over, the overcharges at issue in the case. *Id.* at 908, 911. In light of his passive involvement, TECA held that in order for DOE to recover restitution from Pratt, it had to show that he received his share of the overcharges. *Id.* at 911.

no reason to set aside that factual finding for lack of substantial evidence or error of law.[7]

CONCLUSION

We have reviewed the record and find that there were rational bases for the final RO issued by FERC. The RO was not based on findings unsupported by substantial evidence. The decision of the district court affirming the RO is affirmed.

COSTS

Each party shall bear its own costs.

AFFIRMED.

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[7] Houston and Imparato argue that the record established that Houston operated at an overall net loss during the audit period. Neither DOE nor FERC so found, although Imparato swore in an affidavit that "contrary to [DOE]'s allegations that [Houston] realized profits on its transactions, [Houston] actually operated at an overall net loss." The fallacy of this "overall net loss" argument is that Houston and Imparato do not contest the finding that Houston received $58 million in gross profits due to the overcharges. Even if Houston operated at a net loss, it would still benefit from the overcharge profits. For example, if Houston operated at a $200 million loss independent of the overcharges, but at a $142 million loss because of the overcharges, Imparato benefitted from the overcharges because his solely owned company suffered a smaller loss.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON OIL & REFINING, INC., and JOSEPH A. IMPARATO, Plaintiffs, VS. UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Defendants.	§	CIVIL ACTION NO. H-93-3836

FINAL ORDER

(Entered Mar. 15, 1995)

In accordance with the Court's order issued this day, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment (Entry #28) is **DENIED** and Defendants' Cross-motion for Summary Judgment (Entry #33) is **GRANTED.**

IT IS FURTHER ORDERED that the Remedial Order of the Department of Energy issued to Plaintiffs is **AFFIRMED** and judgment is entered in favor of Defendants requiring Plaintiffs to disgorge as restitution the sum of $57,899,722.44 plus interest to the date of judgment as provided in the Remedial Order, together with post-judgment interest at the rate of 6.57% *per annum* from date of judgment until paid.

IT IS FURTHER ORDERED that Plaintiffs' Unopposed Motion for Leave to File Response (Entry #36) is **GRANTED.**

THIS IS A FINAL ORDER.

SIGNED this 15th day of March, 1995, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON OIL & REFINING, INC., and JOSEPH A. IMPARATO,	§	
Plaintiffs,	§	CIVIL ACTION NO. H-93-3836
VS.	§	
UNITED STATES DEPARTMENT OF ENERGY, *et al.*,	§	
Defendants.	§	

ORDER

(Entered Mar. 15, 1995)

This appeal from a Federal Energy Regulatory Commission ("FERC") remedial order issued October 4, 1993 is before the Court on cross-motions for summary judgment. The remedial order required Houston Oil & Refining, Inc. ("HOR") and Joseph A. Imparato to disgorge approximately $58 million plus interest for illegal layering transactions. The parties have filed comprehensive briefs, the Court has reviewed the record as submitted by the parties, and the motions are ripe for decision.

The standard of review by this Court is limited. The Court may set the agency's order aside only if it is "in excess of the agency's authority, or is based on findings which are not supported by substantial evidence." 12 U.S.C. § 1904 (note). Substantial evidence means enough

evidence to demonstrate that the agency's conclusion was not unreasonable. *Pratt v. Watkins*, 946 F.2d 907 (Temp. Emer. Ct. App. 1991). Additionally, the Department of Energy's interpretation of its own regulations is entitled to great deference. *Thriftway Co. v. Department of Energy*, 867 F.2d 1577 (Temp. Emer. Ct. App. 1989).

Initially, Plaintiffs assert that the Department of Energy lacked the statutory authority to impose liability in this case. This argument is without merit. Section 503 of the Department of Energy Organization Act of 1977, 42 U.S.C. § 7193, vested the Office of Hearings and Appeals ("OHA") and FERC with authority, as an Article I administrative tribunal, to adjudicate allegations by the Secretary that its price control regulations had been violated and to order appropriate relief. *See Bonray Oil Co. v. Department of Energy*, 472 F. Supp. 899 (W.D. Okla. 1978), *aff'd per curiam* 601 F.2d 1191 (Temp. Emer. Ct. App. 1979).

Many of Plaintiffs' arguments involve their attempt to characterize the proceedings as a civil tort action for damages as opposed to an equitable administrative proceeding for restitution. The argument that the imposition of personal liability for a violation of federal energy regulations first requires proof of civil tort liability was rejected by the court in *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16 (Temp. Emer. Ct. App.), *cert. denied sub nom. Chamberlain v. United States*, 484 U.S. 943 (1987). The Court in that case held that personal liability may be imposed when "the individual's wrongful conduct causes the violation of a statute and accompanying regulations such as the crude oil pricing laws." *Id.* at 25. The administrative proceedings in this case sought restitution or disgorgement, and such an award of restitution is an

equitable remedy. *See United States v. Sutton*, 795 F.2d 1040, 1061 (Temp. Emer. Ct. App.), *cert. denied* 479 U.S. 1030 (1987). The proceedings' status as an equitable administrative action for restitution is not changed because the amount of restitution exceeded the amount personally received by Imparato. This is true because a "person who is the animating force for regulatory violations is fully liable even though he does not personally receive all benefits of his illegal activities." *Id.* at 1063. Indeed, the Temporary Emergency Court of Appeals in *Citronelle* reversed the District Court's restriction of the personal liability of the animating force/central figure to the overcharges he actually received. *Citronelle*, 826 F.2d at 27-28. The argument presented here by Plaintiffs was also rejected in *Sauder v. Department of Energy*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981). Accordingly, Plaintiffs' arguments that liability was imposed under common law tort principles, that the three-year statute of limitations for tort actions by the United States applies, and that Imparato cannot be held liable for the full amount of overcharges must fail.

Plaintiffs' constitutional challenges are also without merit. The adjudication of cases involving public rights, such as those involved in this case, by administrative agencies does not violate Article III of the United States Constitution. *See, e.g. Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226 (Fed. Cir. 1992). Additionally, the Seventh Amendment does not prohibit Congress from assigning fact-finding and initial adjudication responsibilities to an administrative forum. *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). Plaintiffs' argument that they were denied due

process by the agency's refusal to consider the evidence presented by Imparato is unsupported by the record. It is clear that the agency considered the evidence; indeed, the agency specifically accepts portions of that evidence. As a result, the constitutional challenges must fail.

Plaintiffs' argument that state corporate law should apply is without merit because federal law governs questions involving rights of the United States which arise under nationwide federal programs, *United States v. Kimble Foods, Inc.*, 440 U.S. 715 (1979), and the argument that the layering rule, 10 C.F.R. § 212.186, is unconstitutionally vague was rejected in *Mapco International Inc. v. Department of Energy*, 993 F.2d 235 (Temp. Emer. Ct. App. 1993).

Plaintiffs also argue that the agency improperly shifted the burden of proof to them and support this argument with statements from the record in which the agency noted that Imparato or HOR had made "no showing to the contrary" or that certain evidence was uncontroverted by Plaintiffs. These comments regarding the failure of Plaintiffs to present evidence to contradict the Department of Energy's evidence merely indicate that the issue is undisputed, not that the burden of persuasion has been shifted.

Finally, Plaintiffs argue that the agency's determination is not supported by substantial evidence. With reference to Imparato, an individual who plays a central role in the violation of the price regulations may be held personally liable for the corporation's liability. *Citronelle*, 826 F.2d at 25; *Sutton*, 795 F.2d at 1060. The administrative record contains substantial evidence to support the

Agency's finding that Joseph A. Imparato was an animating force or central figure who personally violated the anti-layering regulations. Imparato was the president and sole shareholder of the corporate Defendant. He stated by affidavit that he was completely familiar with the crude oil transactions at issue and that he prepared, signed and filed the monthly Crude Oil Reseller Self-Reporting forms. The agency's findings that he was the central figure in the regulatory violations, personally benefitted from the overcharges, and is personally responsible for restitution are supported by substantial evidence and, therefore, cannot be set aside by this Court.

The Court also finds substantial evidence to support the findings upon which HOR's liability was based. The administrative record contains evidence that Plaintiffs engaged in numerous "in-line" transactions between June 1979 and August 1980 in which they bought and resold crude oil without actually taking possession of the oil or performing any services that assisted in moving the crude oil from the oil field to the refinery. In none of the transactions did Plaintiffs either buy the oil from a producer or sell it to a refinery. Defendants made overcharges on these in-line transactions in the amount of $57,989,722.44. Because the findings are supported by substantial evidence, they cannot be set aside.

Based on the foregoing, Plaintiffs' legal arguments are without merit, and the findings of the agency are supported by substantial evidence and are based on an application of the appropriate burden of persuasion. As a result, Plaintiffs' motion for summary judgment must be denied and Defendants' motion must be granted. An

appropriate final order consistent herewith shall be issued this day.

SIGNED this 15th day of March, 1995, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX D

[¶ 61,022]

Houston Oil and Refining, Inc. and Joseph A. Imparato, Docket No. RO88-10-000

Order Adopting Decision and Proposed Order as Modified Affirming Remedial Order

(Issued October 4, 1993)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

[Note: Initial Decision Affirming in Part and Modifying in Part the Proposed Order, issued March 10, 1989, appears at 46 FERC ¶ 63,022.]

This case involves an appeal by Houston Oil and Refining, Inc. (Houston Oil) and Joseph A. Imparato (Imparato) from a Decision and Proposed Order (Proposed Order)[1] affirming a Remedial Order issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE).[2] After a hearing and other proceedings, OHA issued a Remedial Order in which it determined that Houston Oil had violated DOE's layering regulation, 10 C.F.R. § 212.186,[3] by charging prices in excess of the

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[1] 46 FERC ¶ 63,022 (1989).

[2] *Houston Oil and Refining, Inc. et al.*, 17 DOE ¶ 83,011 (1988).

[3] That section provides:

> The price for crude oil charged by a reseller which in a sale performs no service or other function traditionally and historically associated with the resale of crude oil shall not exceed the actual price paid by the reseller for the crude oil, less any amount

acquisition cost in resales of 50,180,034.66 barrels of crude oil[4] from June, 1979, through August, 1980, in which Houston Oil did not perform any traditional reseller services.[5] The Remedial Order held Houston and Imparato jointly and severally liable for the restitution of $57,989,772.44 plus interest, the amount of Houston Oil's gross profits in the contested transactions.[6]

> received in an exchange and any amount received in excess of the amount paid in a matching purchase and sale transaction having the same effect as an exchange, plus any amount paid in an exchange and any amount paid in excess of the amount received in a matching purchase and sales transaction having the same effect as an exchange.

The Temporary Emergency Court of Appeals has recently held that the layering rule is an interpretation of the normal business practices rule, 10 C.F.R. § 210.62(a), and the anti-circumvention rule, 10 C.F.R. § 205.202, which prohibited essentially the same type of conduct as did the layering rule. The practices described in the layering rule are thus violations of 10 C.F.R. § 210.62(a) and 10 C.F.R. § 205.202 and of the Mandatory Petroleum regulations as a whole. *MAPCO International Inc. v. FERC*, 993 F.2d 235 (Temp. Emer. Ct. App. 1993).

[4] 46 FERC at p. 65,081.

[5] Houston Oil did not contest the amount of the alleged violations or the manner in which they were calculated. 17 DOE at p. 86,125.

[6] 17 DOE ¶ 83,011 (1988).

DOE has the authority to hold corporate officers individually liable for restitution based on section 209 of the Economic Stabilization Act of 1970, incorporated into the Emergency Petroleum Allocation Act of 1973 (EPAA) as section 5(a)(1), 15 U.S.C. § 754. The Temporary Emergency Court of Appeals interpreted section 209 as granting DOE the authority to order restitution in *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 721-23 (Temp. Emer. Ct. App.), *cert. denied*, 459 U.S. 877 (1982).

The ALJ affirmed the Remedial Order in a Decision and Proposed Order. The parties then filed reply comments on the ALJ's Proposed Order and DOE filed reply comments.[7] Having considered Petitioners' arguments, the Commission finds no reason to modify the Proposed Order, with minor exceptions, and adopts it, as explained below.[8]

On July 11, 1990, Malcolm M. Turner (Turner), one of the petitioners in *Bayport Refining Co. and Malcolm Turner,* Docket No. RO89-5-000, filed to intervene in this proceeding with respect to Imparato's motion to lodge. The Secretary opposed Turner's motion. The Commission finds that Turner does not have an interest that will be directly affected by this proceeding and that there is no public interest to be served by allowing him to participate. Thus, we deny Turner's motion.

Petitioners object to the ALJ's holding that they had not met their burden of presenting credible evidence to demonstrate any error in the factual findings or legal

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[7] On June 1, 1990, Imparato moved to lodge with the Commission a Proposed Order in another proceeding, *Bayport Refining Co. and Malcolm Turner,* Docket No. RO89-5-000. On February 19, 1992, the Secretary submitted for the record a copy of a Memorandum Opinion in the case of *MAPCO International Inc. v. FERC,* 783 F. Supp. 639 (D.D.C. 1992). The Commission accepts both these submissions for inclusion in the record.

[8] On reviewing the Remedial Order, the Commission agrees with the Secretary's comment that the Remedial Order ruled on challenges to the validity of 10 C.F.R. § 212.186 relying on its own analysis and that of previous OHA orders, and not on the FERC decision in *Erickson Refining Corp.,* 41 FERC ¶ 61,286 (1987), as stated in the Proposed Order.

conclusions of the Remedial Order. Petitioners contend, that, at this stage of the proceeding, they cannot be required to present credible evidence to show error in the Remedial Order's facts or law, but that, instead, FERC is required to make an independent review of OHA's findings and conclusions for error under section 503 of the Department of Energy Organization Act. 42 U.S.C. § 7193.[9]

Petitioners have the opportunity on appeal to make arguments concerning the existing record[10] and also to raise new facts and issues within the limits set by the Commission's Rules of Practice and Procedure.[11] If the ALJ or the Commission finds during the course of the

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[9] That section provides, in pertinent part:

> The Commission shall, upon request, afford an opportunity for a hearing, including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments. To the extent that the Commission in its discretion determines that such is required for a full and true disclosure of the facts, the Commission shall afford the right of cross examination. The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's remedial order, or directing other appropriate relief . . .

[10] Since 1985, DOE files are retained by DOE. The parties append relevant portions of the DOE record to their briefs and other pleadings. DOE's entire administrative record, however, is available to the Commission. 18 C.F.R. 906(d)(3).

[11] 18 C.F.R. § 385.907 (1992). Facts and issues that were not raised below may be raised on appeal if they were unknown or excluded due to unduly restrictive time limits or erroneous rulings and if they are necessary for a full and true disclosure of the facts.

proceeding that error has been committed, they may reverse. As neither Petitioners' arguments nor FERC's review shows error in the facts found or legal conclusions reached in the OHA proceeding and Petitioners have not raised any new facts or issues, Petitioners have provided no basis for changing either the findings of fact or conclusions of law in the Remedial Order and in the ALJ Proposed Order.

Petitioners also contend that the Secretary's interpretation of the layering rule is incorrect and that the Proposed Order was obligated but failed to address this issue, thereby depriving Petitioners of due process. Petitioners claim, first, that they performed services traditionally and historically associated with crude oil resales,[12] and, second, that these services should be included among those permitted by the layering rule.

As the Commission has held previously in such cases as *Merit Petroleum Inc.* and *MAPCO International Inc.*,[13] it

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[12] Petitioners do not name these services in their Comments, but presumably are referring to those listed in their Brief in Opposition to Remedial Order (January 3, 1989); matching supply and demand, assuming financial risk, minimizing transportation costs, and facilitating the transfer of crude oil.

[13] *Merit Petroleum, Inc.*, 62 FERC ¶ 61,023 (1993); *MAPCO International, Inc.*, 56 FERC ¶ 61,063, at p. 61,247 n.5 (1991). *See also Petrade International, Inc.*, 62 FERC ¶ 61,021 (1993) and *Port Petroleum, Inc.*, 62 FERC ¶ 61,026 (1993).

A reviewing court will support a reasonable interpretation of the agency, such as DOE, rather than that of an independent reviewing body like FERC. *MAPCO*, 56 FERC at p. 61,247 n.5 (citing *Martin v. Occupational Safety and Health Review Commission (OSHRC)*, 113 S. Ct. 117 (1991)).

is Commission policy to give deference to DOE's interpretation of its own regulations unless the interpretation is plainly erroneous or inconsistent with the regulations. More to the point, the Secretary's interpretation of the layering rule has been upheld in *MAPCO International, Inc. v. FERC.*[14] Consequently, we reject petitioners' arguments that they performed the necessary services.

Petitioners also assert the Secretary's justification of personal liability under the "particular circumstances and equities" of the case is an element of the Secretary's case and that the Secretary failed to prove this element. The Secretary asserts *Citronelle-Mobile Gathering, Inc. v. Herrington (Citronelle),*[15] which also involved violation of petroleum price controls, does not require the government to show the equities concerning personal liability, as this is an affirmative defense and, that, in any event, *Citronelle* cannot control this proceeding because it was not issued until after this case was briefed and argued.[16]

Petitioners are not challenging here the facts that established that Imparato was a "central figure" in Houston Oil's transactions.[17] Rather, petitioners are

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[14] 993 F.2d 235, 240-41 (Temp. Emer. Ct. App. 1993).

[15] 826 F.2d 16, 24 (Temp. Emer. Ct. App.) (*Citronelle*), *cert. denied sub nom. Chamberlain v. United States,* 108 S. Ct. 327 (1987).

[16] The Secretary points out that briefing was completed in 1985, oral argument before OHA was March 12, 1987, and *Citronelle* was decided May 7, 1987, 826 F.2d at p. 16.

[17] The Remedial Order based its findings of Imparato's liability on the following facts which are uncontested here: Imparato was the president and sole shareholder of Houston Oil during the audit period, that he was familiar with the audited

objecting to the Secretary's failure to put forward evidence concerning mitigation of the restitutionary amount. The Secretary has the burden of proving the elements of a violation of the layering regulation.[18] The elements, contained in 10 C.F.R. § 212.186, do not include the circumstances and equities of the case that could justify mitigation, so that the Secretary was not obligated to introduce such evidence. *Citronelle* recognizes the general principle of equity that the court should consider the surrounding circumstances when it imposes an equitable remedy such as restitution.[19] But those factors are affirmative defenses and must be pleaded by Petitioners. Here, the ALJ explicitly considered the equities.[20] He found Petitioners had not put forward or argued any equities that might mitigate against individual liability.[21] Petitioners have presented no reason for the Commission to change the ALJ's finding.

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crude oil transactions, and that he was the only person involved in setting Houston Oil's prices in those transactions. 17 DOE at p. 86,134. Consequently, the Remedial Order found Imparato had played a central role in causing the regulatory violations and was, thus, a "central figure." It found further that, because of Imparato's control and ownership of Houston Oil during the audit period, he had benefitted from the overcharges.

18 10 C.F.R. § 205.192A and 18 C.F.R. § 385.911(a) and (b).

19 "[B]ecause restitution is an equitable remedy, we would be careful to condition a finding of personal liability on the particular circumstances and equities of each case." 826 F. 2d at p. 25.

20 46 FERC at p. 65,083.

21 Prehearing Conference, January 27, 1989, Tr. 48-53, 58-60, 79-87.

Finally, Petitioners claim the Secretary is imposing liability on Imparato based on tort law and that this can only be done by an Article III court, not an Article I court such as OHA or the Commission. The Commission rejects these arguments. " '[P]ersonal responsibility for corporate liability may attach when the individual's wrongful conduct causes the violation of a statute and accompanying regulations such as the crude oil pricing laws.' "[22] Thus, a corporate officer may be liable for acts in which he plays a role in violating the pricing regulations. This theory of liability is known as the "central figure" or "tortious conduct" theory of liability.[23] It is based on the fact that the conduct of the corporate officer violates law or regulation and is not dependent on establishing the elements of common law torts.[24] The Secretary clearly has established Imparato's central role in the violations at issue here. In this proceeding, the Secretary is enforcing federal pricing regulations against Imparato under a theory of personal liability based on conduct; he is not bringing a common law tort action against Imparato.[25] Consequently, the Secretary has properly brought this action and has done so in the correct forum.

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[22] *Citronelle,* 826 F.2d at p. 25.

[23] 17 DOE at p. 86,132.

[24] *Citronelle,* 826 F.2d at p. 25.

[25] *Bayport Refining Co. and Malcolm Turner,* 51 FERC ¶ 63,011 (1990), does not require a different answer. Petitioners assert the *Bayport* Proposed Order found the Secretary was imposing personal liability based on common law tort and that he lacked jurisdiction to do so. That decision is reversed in an order issued contemporaneously with this one [65 FERC ¶ 61,021].

The Commission orders:

(A) The Decision and Proposed Order Affirming Remedial Order is adopted with the modifications in the body of this order.

(B) The comments are accepted or rejected as indicated in the body of this order.

(C) The motion to intervene of Malcolm M. Turner is denied.

APPENDIX E

United States Court of Appeals
for the Federal Circuit

95-1354

HOUSTON OIL & REFINING, INC.
and JOSEPH A. IMPARATO,

Plaintiffs-Appellants,

v.

UNITED STATES FEDERAL ENERGY
REGULATORY COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY,
Hazel O'Leary,
SECRETARY OF ENERGY,
and THE UNITED STATES,

Defendants-Appellees.

ORDER

(Filed Nov. 18, 1996)

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 25, 1996.

FOR THE COURT,
MELVIN L. HALPERN,
ACTING CLERK

Dated: November 18, 1996

By /s/ Brian P. LeDuc
Brian P. LeDuc
Associate Chief
Deputy Clerk

cc: GRANT COOK
DON W. CROCKETT

HOUSTON OIL & REFINING V FERC, 95-1354
(DCT – H-93-3836)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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